

Below is an Opinion of the Court.

  
RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	
AIRCRAFT INVESTOR RESOURCES, LLC,	)	Bankruptcy Case
	)	No. 09-38458-rld11
Debtor.	)	
_____	)	
LT BUILDERS GROUP, LLC,	)	
	)	Adv. Proc. No. 10-03246-rld
Plaintiff,	)	
	)	
v.	)	
	)	MEMORANDUM OPINION
BLUE SKY AVGROUP, LLC, et al.,	)	
	)	
Defendants.	)	
_____	)	

On April 28, 2011, I heard argument at the hearing ("Hearing") on plaintiff LT Builders Group, LLC's ("LTB") Motion for Partial Summary Judgment ("Motion") on 1) all claims for relief asserted by LTB in its Complaint ("Complaint"), Docket No. 1 in this adversary proceeding ("Adversary Proceeding"); 2) all counterclaims asserted by defendant Blue Sky AvGroup, LLC ("BSA") in its Answer (Docket No. 10); and 3) all counterclaims asserted by defendant Johan Charl Brink ("Brink") in his

1 Answer (Docket No. 13). In the Complaint, LTB asserts two mirror image  
2 claims for declaratory relief against BSA and Brink respectively in  
3 Counts 1 and 2 for each claim. Hereafter, the counts in each claim of  
4 the Complaint will be referred to collectively as "Count 1" and "Count  
5 2." Again, with respect to the counterclaims asserted by BSA and Brink  
6 in their respective Answers, Counterclaims 1 through 4 in each Answer  
7 request the same relief with regard to LTB. Accordingly, hereafter, the  
8 counterclaims in each Answer will be referred to collectively as  
9 "Counterclaims 1 through 4." LTB filed an Answer to the defendants'  
10 counterclaims, asserting its own counterclaim against BSA and Brink for  
11 intentional interference with economic relations. LTB does not seek  
12 summary judgment on its counterclaim in the Motion. At the conclusion of  
13 the Hearing, I took the Motion under advisement.

14 Following the Hearing I have carefully considered the  
15 pleadings, memoranda of arguments and declarations filed by the parties,  
16 in light of the arguments presented, and applicable legal authorities.  
17 Based on my consideration of the record before me, I conclude that LTB is  
18 entitled to summary judgment on Count 1 and partial summary judgment on  
19 Count 2 of the claims stated in its Complaint, with the balance of Count  
20 2 to be dismissed. I further conclude that LTB is entitled to summary  
21 judgment on Counterclaims 1, 3 and 4 stated in the defendants' Answers.  
22 The parties are agreed that the issues between them in Counterclaim 2  
23 have been resolved and will be dismissed as moot.

24 This Memorandum Opinion sets forth my conclusions of law in  
25 light of the record before me under Civil Rule 52(a), applicable in this  
26

adversary proceeding under Federal Rule of Bankruptcy Procedure 7052.<sup>1</sup> I have jurisdiction to decide this matter under 28 U.S.C. §§ 1334 and 157(b)(2)(K), (N) and (O).

#### Background

##### A. Events in the main bankruptcy case

###### 1. Events triggering the debtor's bankruptcy

From 2003 to 2009, the debtor, Aircraft Investor Resources, LLC ("AIR, LLC"), designed, manufactured and sold various models of aircraft and aircraft kits under the brand "Epic." See Second Amended Disclosure Statement at 4 (main case docket no. 610). AIR, LLC also provided construction assistance to amateur aircraft kit builders ("amateur builders"). Id. AIR, LLC operated out of a leased facility in Bend, Oregon ("facility"). Id.

AIR, LLC experienced significant financial problems, ultimately becoming unable to comply with its obligations to individual amateur builders, its landlord, ER1, LLC ("ER1"), and other creditors. Id. Several creditors commenced litigation against AIR, LLC, its officers and directors, and ER1. Id.

ER1 locked AIR, LLC out of the facility on July 27, 2009. Id. at 5. At that point, AIR, LLC ceased its operations. Id.

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<sup>1</sup> Unless otherwise specified, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

AIR, LLC filed its chapter 11 petition on September 10, 2009.<sup>2</sup>  
The chapter 11 trustee ("trustee") was appointed on October 27, 2009.

## 2. Sale of the debtor's assets under § 363

Following his appointment, the trustee began efforts to sell AIR, LLC's assets, fielding inquiries from various prospective buyers, including Merlin Partners, LLC ("Merlin"). Id. During negotiations with Merlin, Harlow Aerostructures, LLC ("Harlow"), expressed interest in purchasing AIR, LLC's assets. Id. Harlow soon entered into an asset purchase agreement with the trustee ("Harlow APA"). Id. at 6. Under the Harlow APA, Harlow became the stalking horse bidder with a \$2 million purchase offer for substantially all of AIR, LLC's assets. Id.

The trustee filed a motion for an order to establish bidding procedures for the purchase of AIR, LLC's assets and to approve the proposed sale of substantially all of AIR, LLC's assets to Harlow pursuant to § 363(f)<sup>3</sup> ("Sale Motion")(main case docket no. 256). After

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<sup>2</sup> AIR, LLC originally filed its chapter 11 petition in the United States Bankruptcy Court for the District of Nevada. AIR, LLC's bankruptcy case was transferred to the United States Bankruptcy Court for the District of Oregon ("bankruptcy court") on October 15, 2009.

AIR, LLC's wholly-owned subsidiaries, Aircraft Completion Services, LLC ("ACS"), and Epic Air, LLC ("Epic Air"), each filed chapter 7 petitions on October 16, 2009, and October 23, 2009, respectively. See Second Amended Disclosure Statement at 5. Epic Air filed its chapter 7 petition in Nevada, whereas ACS filed its chapter 7 petition in the United States Bankruptcy Court for the District of Delaware. Id. Both bankruptcy cases soon were transferred to the bankruptcy court and substantively consolidated with AIR, LLC's bankruptcy case. Id.

<sup>3</sup> Section 363(f) provides: The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in  
(continued...)

1 holding two hearings, the bankruptcy court entered an order ("Sale  
2 Procedures Order")(main case docket no. 283) granting the trustee's sale  
3 motion. Id.

4 Not long before the bid deadline, China Aviation Industry  
5 General Aircraft Co., Ltd. ("China Aviation"), expressed interest in  
6 purchasing AIR, LLC's assets. Id. China Aviation made a bid on  
7 March 23, 2010. Id.

8 On March 26, 2010, the trustee conducted an auction of AIR,  
9 LLC's assets; China Aviation, Harlow and LTB made competing bids. Id.  
10 The trustee selected China Aviation's final bid of \$4.3 million as the  
11 prevailing bid. Id. China Aviation consequently entered into an asset  
12 purchase agreement with the trustee ("China Aviation APA"). LTB was  
13 designated assignee under the China Aviation APA. See Amended Order (I)  
14 Authorizing and Approving Asset Purchase Agreement by and between China  
15 Aviation Industry General Aircraft Co., Ltd. and Trustee; (II)  
16 Authorizing and Approving Sale of Substantially All Assets of  
17 Substantively Consolidated Debtor Free and Clear of Interests; and (III)  
18 Granting Certain Related Relief ("Amended Sale Order")(main case docket  
19

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20 <sup>3</sup>(...continued)  
21 such property of an entity other than the estate, only if -  
22 (1) applicable nonbankruptcy law permits sale of such  
23 property free and clear of such interest;  
24 (2) such entity consents;  
25 (3) such interest is a lien and the price at which such  
26 property is to be sold is greater than the aggregate  
value of all liens on such property;  
(4) such interest is in bona fide dispute; or  
(5) such entity could be compelled, in a legal or  
equitable proceeding, to accept a money satisfaction of  
such interest.

1 no. 397), at 6, 17.

2 Under Section 1.1 of the China Aviation APA, China Aviation  
3 purchased AIR, LLC's assets listed on Schedule 1.1, attached to the China  
4 Aviation APA. See Amended Sale Order at 4, 22. In particular, under  
5 Section 1.1(a), these assets included "all equipment, machinery,  
6 furniture, trade fixtures, improvements, tooling, molds, plugs, hand  
7 tools and other tangible personal property owned by [AIR, LLC], wherever  
8 located, including without limitation all of such property located at the  
9 [facility] other than WIP [work in progress] . . . ." See Amended Sale  
10 Order, Exh. A at 22. Under Section 1.1(b), these assets also included  
11 "all inventories of supplies, raw materials, parts, and finished goods  
12 inventory owned by [AIR, LLC], including without limitation all of such  
13 property located at the [facility] other than WIP . . . ." Id.

14 Sections 2.4 and 7.6(b) of the China Aviation APA provided,  
15 however, that AIR, LLC's assets did not include  
16 any partially-completed aircraft or any parts inventory that are owned by  
17 amateur builders that [were AIR, LLC's] customers. For this purpose,  
18 parts that are attached to aircraft, parts that are located in the . . .  
19 facility and specifically listed in the aircraft log for each partially-  
20 completed aircraft, and parts specially manufactured for aircraft located  
21 in the . . . facility shall be deemed excluded from the Assets.

22 Id. at 8.

23 Section 10.3(a) of the China Aviation APA required that, prior  
24 to the closing of the sale, the trustee give the amateur builders access  
25 to the facility to allow each amateur builder to  
26 (i) remove its partially-completed aircraft from the facility at its sole  
cost and expense and (ii) identify and segregate any parts and other  
inventory such [amateur builder] believes it owns. In no event shall any  
[amateur builder] be permitted to remove any assets from the . . .  
facility other than its partially-completed aircraft.

1  
2 Id. at 12.

3           Section 10.3(b) of the China Aviation APA also provided that  
4 LTB would employ  
5 a third-party to conduct and complete a detailed inventory of all assets  
6 and property . . . located in the . . . facility as of the Closing Date,  
7 including without limitation, any remaining partially-completed aircraft  
8 and any parts or other inventory that are owned by the [amateur  
9 builders]. . . . Upon completion and delivery of the inventory of assets  
10 to [China Aviation, or its assignee, LTB] will provide a copy of the  
11 inventory of assets to the [trustee] and each of the [amateur builders]  
12 (the date on which [China Aviation or LTB] delivers a copy of such  
13 inventory of assets, the "Inventory Delivery Date").

14 Id.

15           3. Inventory of the AIR, LLC's assets

16           Before the April 2, 2010 hearing on the Sale Motion,<sup>4</sup> BSA filed  
17 a motion to conduct an inventory of the assets ("BSA Inventory  
18 Motion")(main case docket no. 306). BSA asked that the bankruptcy court  
19 direct the trustee to allow BSA to conduct an inventory of the personal  
20 property and, after determining which personal property belonged to it,  
21 remove such personal property before approving and closing the sale to  
22 China Aviation.

23           At the April 2, 2010 hearing, the bankruptcy court approved the  
24 Sale Motion. See Record of Proceeding of April 2, 2010 Hearing (main  
25 case docket no. 362). The bankruptcy court entered the Amended Sale  
26 Order on April 9, 2010. The Amended Sale Order provided that AIR, LLC's  
assets did not include "any partially-completed aircraft or any parts

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<sup>4</sup> The bankruptcy court conducted a preliminary hearing on the Sale Motion prior to the April 2, 2010 hearing. See Record of Proceeding of March 30, 2010 Hearing (main case docket no. 362).

1 inventory that are owned by amateur builders that [were AIR, LLC's]  
2 customers . . . ." Amended Sale Order at 11, ¶ 3. The Amended Sale  
3 Order further provided that "[a]ny sale of Assets by the Trustee shall  
4 specifically exclude all partially completed aircraft and any parts  
5 inventory owned by amateur builders." Amended Sale Order at 17, ¶ 26.

6 As for the BSA Inventory Motion, the bankruptcy court entered a  
7 stipulated order regarding the inventory of AIR, LLC's personal property  
8 assets ("Stipulated Inventory Order")(main case docket no. 416) on  
9 April 30, 2010.

10 Paragraph 2 of the Stipulated Inventory Order provided that LTB  
11 and the trustee would conduct a complete inventory of all the personal  
12 property located in the facility ("facility inventory"), consistent with  
13 the terms and procedures set forth in the China Aviation APA and the  
14 Stipulated Inventory Order. Stipulated Inventory Order at 2. The  
15 facility inventory was to be completed by June 7, 2010, provided that if  
16 any party interfered with, delayed or failed to cooperate with the  
17 performance of the facility inventory at any time, the trustee or LTB  
18 could seek further instructions and/or relief from the bankruptcy court.  
19 Id. at 3.

20 Paragraph 2 of the Stipulated Inventory Order further provided  
21 that the trustee and LTB "may establish further detailed procedures in  
22 their sole discretion to accomplish the Facility Inventory and its  
23 purposes in an orderly and expeditious manner." Id. (Emphasis added.)

24 Paragraph 4 of the Stipulated Inventory Order authorized the  
25 trustee and LTB to implement certain procedures to complete the facility  
26 inventory. Under paragraph 4(b) of the Stipulated Inventory Order:



1 The Trustee and/or [LTB] will provide notice to known persons and  
2 entities claiming ownership of personal property within or affixed to the  
3 Facility of an opportunity to enter the Facility and identify, at  
4 prearranged times and under further procedures to be established by the  
5 Trustee and [LTB], any property in which they claim an ownership  
6 interest, other than the partially completed kit aircraft listed in  
7 Subsection 4c (below),<sup>5</sup> as to which ownership is stipulated. The persons  
8 and entities to be notified under this Section include: (i) all known  
9 owners of LT Aircraft . . . . [collectively, the "Notice Parties"].  
10 Notice Parties who are unavailable to visit the Facility may designate  
11 proxies, in writing and in a form acceptable to the Trustee and [LTB], to  
12 make such identifications on their behalf. Unless alternative  
13 arrangements have been consented to by both the Trustee and [LTB], the  
14 failure of any Notice Party to appear at the designated dates in person  
15 or by way of a proxy, or otherwise identify its property (other than kit  
16 aircraft identified in Subsection 4(d) by those designated dates, shall  
17 constitute a waiver of the right to claim specific personal property  
18 within the Facility. (Emphasis added.)

19 Id. at 4.

20 Paragraph 4(d) of the Stipulated Inventory Order provided:

21 The Trustee and/or [LTB] shall catalog, by description and location  
22 within the Facility, all items of personal property located in the  
23 Facility as to which any of the Notice Parties assert ownership  
24 interests, and shall identify, using an appropriate system, each such  
25 item of personal property and the party or parties claiming ownership of  
26 such item. In connection with the Notice Party's opportunity to enter  
27 the Facility as provided in Subsection 3b [sic], the Trustee or [LTB]  
28 will permit, in accordance with procedures developed by the Trustee and  
29 [LTB], each Notice Party asserting ownership of an item of personal  
30 property to tag its asserted ownership interest. No items of personal  
31 property may be moved or removed by any Notice Party from their existing  
32 locations without the specific consent of the Trustee and [LTB].  
33 (Emphasis added.)

34 Id. at 5-6.

35 Paragraph 6 of the Stipulated Inventory Order provided that the  
36 "Facility Inventory, including the results of the dispute resolution  
37 processes described [herein] (including any adversary proceedings that  
38 \_\_\_\_\_

39 <sup>5</sup> Paragraph 4(c) of the Stipulated Inventory Order addressed the  
40 release of the hulls of certain aircraft owned by particular amateur  
41 builders. Brink and BSA were among those amateur builders allowed to  
42 remove their hulls under paragraph 4(c).

1 may be filed), shall be the exclusive and final method of establishing  
2 the ownership of the personal property in the Facility." Id. (Emphasis  
3 added.)

4         The trustee filed a motion for an order confirming the  
5 inventory results on June 29, 2010. See Trustee's Motion for an Order  
6 (1) Confirming the Inventory Results, (2) Releasing Undisputed Third-  
7 Party Property from Facility, and (3) Requiring Pick-Up or Bailment of  
8 the Property ("Inventory Confirmation Motion")(main case docket no. 470).  
9 He also filed two status reports, reporting that he completed the  
10 facility inventory but noting that BSA and Brink asserted claims in  
11 personal property claimed by LTB and certain amateur builders. See  
12 Chapter 11 Trustee's Fourth Status Report Regarding the Inventory Order  
13 ("Inventory Status Report")(main case docket no. 469); Trustee's  
14 Supplemental Report re: Inventory (August 14, 2010)("Supplemental Status  
15 Report")(main case docket no. 507). The trustee attached as exhibits to  
16 the Inventory Status Report lists of personal property that LTB and other  
17 creditors claimed as their own. The trustee attached as exhibits to the  
18 Supplemental Status Report lists of additional items of inventory claimed  
19 by BSA and Brink ("Additional Items Lists").

20         BSA and Brink objected to the Inventory Confirmation Motion.  
21 See BSA's Objection to Trustee's Motion for an Order (1) Confirming the  
22 Inventory Results, (2) Releasing Undisputed Third-Party Property from  
23 Facility, and (3) Requiring Pick-Up or Bailment of Property ("BSA  
24 Objection")(main case docket no. 496); Brink's Joinder in BSA's Objection  
25 to [Inventory Confirmation Order] ("Brink's Joinder")(main case docket  
26 no. 497)(collectively, "BSA/Brink Objection"). BSA and Brink attached

1 the Additional Items List to the BSA/Brink Objection.

2 BSA and Brink argued that the Stipulated Inventory Order  
3 established a two-step procedure for identifying and tagging items of  
4 personal property in the facility. BSA Objection at 2. Amateur builders  
5 first would identify and tag items of personal property in which they  
6 claimed a specific identifiable ownership interest as "the initial step  
7 in determining ownership rights with each [amateur] builder." Id. The  
8 trustee and LTB then would prepare a facility inventory, which would  
9 describe all items in the facility, including items in which each amateur  
10 builder claimed an ownership interest - essentially, a comprehensive,  
11 all-encompassing inventory. Id. Once the trustee and LTB completed the  
12 facility inventory, the amateur builders would have the opportunity to  
13 identify items listed in the facility inventory that were described  
14 either as general inventory or as being owned by another amateur builder.  
15 Id. If two or more amateur builders claimed an ownership interest in any  
16 item, they would go through the dispute resolution process set forth in  
17 the Stipulated Inventory Order to resolve their competing claims. Id. at  
18 3.

19 BSA and Brink claimed that, when their representative, Ashley  
20 Emerson, visited the facility on April 30, 2010, he had received a  
21 catalog of personal property items compiled by Christa Thornton-Smith of  
22 CAZ Consulting, LLC ("CAZ"), whom the trustee and LTB retained to conduct  
23 and prepare the facility inventory. Id. The catalog listed categories  
24 of items pre-designated as belonging to certain amateur builders and  
25 items identified as inventory. Id. Emerson believed he was to confirm  
26 and tag only those items in the catalog specifically identifiable as

1 those belonging to BSA and Brink. Id. In fact, in his Declaration,  
2 Emerson stated that,

3 My visit to the facility was the first visit of all  
4 [amateur] builders who were being asked to identify  
5 personal property belonging to them. . . . When I  
6 began the inspection on April 30, 2010, I was  
7 specifically advised by Ms. Smith and Doug King, a  
8 principal of [LTB], that I was only to identify or  
tag, the items that belonged to either [BSA] or Brink.  
I did not identify any items from general inventory  
other than items painted the custom colors of the  
[BSA] or Brink Airplane or specifically identified by  
serial number for either plane.

9 He did not believe that he was going to tag items designated as belonging  
10 to other amateur builders or identified as general inventory. Id.  
11 Emerson was given access to the entire facility to claim and tag personal  
12 property items owned by BSA and Brink. However, had they known that the  
13 inventory process consisted of one step, BSA and Brink argued, they would  
14 have marked every single item in which they had a possible ownership  
15 interest or needed to complete their aircraft. Id. at 5.

16 LTB filed a response (main case docket no. 501), arguing that  
17 BSA and Brink were attempting to circumvent the express terms of the  
18 Stipulated Inventory Order by asserting late claims to personal property  
19 items after the facility inventory was completed. LTB further argued  
20 that it purchased all general inventory items under the China Aviation  
21 APA. Accordingly, BSA and Brink could not assert claims to general  
22 inventory items.

23 Following the hearing on August 11, 2010, the bankruptcy court  
24 granted the Inventory Confirmation Motion, entering an order ("Inventory  
25 Confirmation Order")(main case docket no. 515) on August 26, 2010. The  
26 Inventory Confirmation Order provided in paragraph 1 that any item of

1 personal property claimed by any third-party would be released if it was  
2 not subject to the competing claims of Brink and BSA. Inventory  
3 Confirmation Order at 2. The Inventory Confirmation Order included as an  
4 exhibit the Additional Items List.

5 With respect to the BSA/Brink Objection, the bankruptcy court  
6 stated that it would set the BSA/Brink Objection for evidentiary hearing  
7 if not resolved. Id.

8  
9 B. Events in the adversary proceeding

10 1. LTB's complaint

11 Nine days after the hearing on the Inventory Confirmation  
12 Motion, LTB filed a complaint against BSA and Brink for declaratory  
13 relief under Rule 7001(2) and (9) to determine the validity and extent of  
14 their interests in certain general inventory items. LTB sought a  
15 judgment declaring that: (1) BSA's and Brink's claims to such general  
16 inventory items or any other personal property items were untimely,  
17 barred and/or waived (Count 1), and (2) BSA and Brink had no ownership  
18 interest in the general inventory items or any other personal property  
19 items (Count 2).

20 BSA and Brink each filed answers to the complaint and asserted  
21 counterclaims against LTB. In their answers, BSA and Brink set forth the  
22 same arguments they made in the Brink/BSA Objection. BSA and Brink  
23 further contended that the catalog provided to Emerson on April 30, 2010  
24 did not include many essential items.

25 As to their counterclaims, Brink and BSA sought (1) a  
26 declaratory judgment that the Supplemental Status Report was the

1 operative inventory report (Counterclaim 1); (2) an injunction requiring  
2 LTB to provide them with a copy of the facility inventory (Counterclaim  
3 2); (3) a declaratory judgment allowing BSA and Brink to identify all  
4 assets in the facility inventory that they are "entitled to" or have an  
5 ownership interest in (Counterclaim 3); (4) an injunction requiring LTB  
6 to allow them to participate in the dispute resolution process  
7 established by the Stipulated Inventory Order (Counterclaim 4).

8 LTB filed an answer to the counterclaims, asserting various  
9 affirmative defenses. It also asserted a compulsory counterclaim for  
10 intentional interference with economic relations. Specifically, LTB  
11 contended that the allegations and injunctive claims made by BSA and  
12 Brink in their answers substantially interfered with LTB's ownership of  
13 the AIR, LLC assets it purchased and with its business and economic  
14 relationships. LTB sought not less than \$50,000 in damages against BSA  
15 and Brink on its compulsory counterclaim, along with an injunction  
16 against further interference with LTB's business and economic  
17 relationships.

## 18 19 2. LTB's motion for partial summary judgment

20 Five months after the initial pre-trial conference, LTB filed  
21 the Motion. LTB argued that it was entitled to summary judgment that the  
22 claims of BSA and Brink were waived under the terms of the Stipulated  
23 Inventory Order. LTB contended that paragraph 4(b) of the Stipulated  
24 Inventory Order provided that all claims of third parties to personal  
25 property within the facility were waived unless asserted at the time of  
26 each claimant's scheduled appointment during the inventory procedure.

1 Contrary to the assertions of BSA and Brink, the Stipulated Inventory  
2 Order did not provide a two-step process; it provided for each party "to  
3 have one visit to the facility to identify all property without  
4 limitation." LTB's Memorandum of Law in Support of Motion for Partial  
5 Summary Judgment at 8 ("LTB Memo")(adv. proc. docket no. 42).

6 LTB further argued that it was entitled to summary judgment  
7 that it owned all inventory and other personal property in the facility,  
8 free and clear of the claims of BSA and Brink, as LTB had purchased all  
9 of the debtor's assets under § 363. BSA and Brink never provided any  
10 evidence to show that they owned any personal property in the facility.  
11 The additional items claimed by BSA and Brink were general inventory  
12 items purchased by LTB under § 363. LTB Memo at 15.

13 LTB also sought dismissal of all of the counterclaims of BSA  
14 and Brink.<sup>6</sup> With respect to Counterclaim 1 that the Supplemental Status  
15 Report be declared as the operative inventory report, LTB contended that  
16 it did not state a claim upon which relief could be granted - the  
17 trustee's status reports spoke for themselves.

18 LTB further claimed that the third and fourth counterclaims  
19 were moot. With respect to Counterclaim 3 seeking a declaratory judgment  
20 that BSA and Brink each was entitled to identify all assets in the  
21 facility inventory it believed it was entitled to or had an ownership  
22

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23  
24 <sup>6</sup> With respect to the second counterclaim requiring LTB to provide  
25 them a copy of the master inventory list, BSA and Brink conceded that  
26 this counterclaim was moot and may be dismissed, as they and LTB resolved  
it through discovery and a settlement conference. Defendants' Opposition  
to Plaintiff's Motion for Partial Summary Judgment at 23 ("BSA/Brink  
Opposition")(adv. proc. docket no. 83).

1 interest in, LTB claimed that BSA and Brink already had made those  
2 identifications. Moreover, neither BSA nor Brink provided any evidence  
3 showing such alleged ownership.

4 As to the Counterclaim 4 seeking to require LTB to participate  
5 in the dispute resolution process contemplated by the Stipulated  
6 Inventory Order, LTB asserted that BSA, Brink and LTB already had  
7 participated in informal and formal dispute resolution procedures to no  
8 avail.

9 BSA and Brink opposed the Motion, advancing several arguments.  
10 BSA and Brink first contended that paragraph 4(b) of the Stipulated  
11 Inventory Order required LTB and the trustee to create additional  
12 procedures to carry out the facility inventory. BSA/Brink Opposition  
13 at 3.

14 Specifically, the Stipulated Inventory Order provided for a  
15 two-step process, the first of which required the amateur builders to  
16 identify and tag their own personal property located within the facility.  
17 BSA/Brink Opposition at 8. The second step involved the creation of a  
18 comprehensive list that included personal property items in which each  
19 amateur builder claimed an ownership interest and general inventory items  
20 (e.g., parts, inventory and manuals). Id. Once completed, the amateur  
21 builders should have the opportunity to identify items listed in the  
22 facility inventory that were described either as general inventory or as  
23 being owned by another amateur builder.

24 BSA and Brink claimed that when their proxy, Emerson, visited  
25 the facility, Thornton-Smith instructed him to tag only those personal  
26 property items belonging to BSA and Brink. Id. at 9. Emerson did not



1 identify any general inventory items. Id. According to Emerson,  
2 Thornton-Smith never instructed him to tag any personal property items  
3 necessary to complete the aircraft of BSA and Brink. Id.

4 BSA and Brink also contended that CAZ was to create a master  
5 list of the assets in the facility so that the amateur builders could  
6 identify the assets they owned before the assets were released from the  
7 facility. Thornton-Smith of CAZ did not provide BSA and Brink with a  
8 comprehensive inventory list, they asserted, but with "inventory  
9 spreadsheets" (i.e., catalog). The catalog she provided BSA and Brink  
10 did not include all of the items that were listed in other inventory  
11 spreadsheets provided to other amateur builders, who were affiliated with  
12 LTB. According to BSA and Brink, the catalog contained categories of  
13 items pre-designated as belonging to certain amateur builders and items  
14 identified as inventory. Those items categorized as inventory, BSA and  
15 Brink claimed, were not described with sufficient specificity to allow  
16 for identification.

17 BSA and Brink asserted that Thornton-Smith moreover allowed  
18 other amateur builders to make multiple visits to the facility, whereas  
19 BSA and Brink's representative only visited the facility once to identify  
20 personal property belonging to BSA and Brink.

21 BSA and Brink also argued that LTB was not entitled to summary  
22 judgment on its ownership claim because there is no actual controversy  
23 between LTB and BSA concerning the disputed personal property. Any  
24 controversy over ownership of the personal property in dispute, BSA and  
25 Brink contend, lies between BSA and Brink and other individual amateur  
26 builders who also claimed an ownership interest in that same personal

1 property.

2           Even if LTB had a valid claim, BSA and Brink argued that LTB  
3 still was not entitled to summary judgment because there was sufficient  
4 evidence that BSA and Brink had valid ownership claims to the disputed  
5 personal property. BSA fully paid for its aircraft prepetition. Brink's  
6 aircraft was the next in line to be completed, with BSA's aircraft to  
7 follow immediately.

8           BSA and Brink further argued that LTB was not entitled to  
9 summary judgment on their counterclaims. As to their first counterclaim,  
10 BSA and Brink asserted that the Supplemental Inventory Report was the  
11 operative report; because it was incorporated into the Inventory  
12 Confirmation Order, the Supplemental Inventory Report was the law of the  
13 case. BSA/Brink Opposition at 22.

14           With respect to their third counterclaim, BSA and Brink  
15 contended that they did not identify personal property items already, as  
16 LTB asserted. BSA and Brink stated that their third counterclaim would  
17 be moot only if LTB conceded that the Supplemental Inventory Report was  
18 the operative report, which it did not. BSA/Brink Opposition at 23.

19           As to their fourth counterclaim, BSA and Brink argued that LTB  
20 misled them regarding the process for identifying the personal property  
21 assets in the facility. BSA and Brink contended that LTB interfered with  
22 their rights at every step of the way. Id. at 24. BSA and Brink  
23 requested that the bankruptcy court determine that they had a right to  
24 assert an interest in the personal property items described in the  
25 Additional Items List incorporated in the Inventory Confirmation Order.  
26 Id. at 24.

1  
2 Discussion

3  
4 A. Summary judgment standards

5 Under Civil Rule 56(c), applicable under Rule 7056, summary  
6 judgment is appropriate only when "the pleadings, the discovery and  
7 disclosure materials on file, and any affidavits show that there is no  
8 genuine issue as to any material fact and that the movant is entitled to  
9 judgment as a matter of law." Summary judgment should not be entered  
10 when there are disputes over facts that may affect the outcome of the  
11 suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S.  
12 242, 249 (1986). Irrelevant or unnecessary factual disputes will not be  
13 counted. Id. A material fact is genuine if the evidence is such that  
14 the fact-finder could return a verdict for the nonmoving party. Id. All  
15 justifiable inferences from the evidence presented must be considered in  
16 favor of the nonmoving party. Id. at 255.

17 The movant initially bears the burden of showing that there are  
18 no genuine issues of material fact. Bhan v. NME Hospitals, Inc., 929  
19 F.2d 1404, 1409 (9th Cir. 1991). If the movant satisfies this burden,  
20 then the opposing party must produce sufficient evidence, through  
21 affidavits or admissible discovery material, to demonstrate that genuine  
22 material factual disputes exist. Id. The nonmoving party cannot rely on  
23 the allegations in its pleadings to meet that burden. Nelson v. Pima  
24 Cnty. College, 83 F.3d 1075, 1081-82 (9th Cir. 1996)("[M]ere allegations  
25 and speculation do not create a factual dispute for the purpose of  
26 summary judgment.").

1 B. Analysis

2 I have reviewed LTB's complaint, BSA's and Brink's answers and  
3 counterclaims, LTB's answer to their counterclaims, the various  
4 declarations and affidavits submitted by LTB, BSA and Brink. I also have  
5 taken judicial notice of various documents filed in the main case and the  
6 adversary proceeding relevant to the matters before me. See Federal Rule  
7 of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006).  
8 Of these documents, I particularly focused on the China Aviation APA, the  
9 Amended Sale Order and the Stipulated Inventory Order.

10 Having reviewed and considered the parties' submissions, and  
11 all of these relevant documents, as well as relevant legal authorities, I  
12 have reached conclusions as stated above. My reasons follow.

13  
14 1. Overarching Considerations

15 Underlying this bitterly fought litigation is an unfortunate,  
16 but fundamental misunderstanding by defendants of what a sale under § 363  
17 accomplishes. Under § 363(b)(1), "The trustee, after notice and a  
18 hearing, may use, sell, or lease, other than in the ordinary course of  
19 business, property of the estate. . . ." § 363(f) allows the trustee to  
20 sell property of the estate free and clear of competing liens and  
21 interests under specific circumstances, as identified in n.3 above.  
22 § 363 advisedly allows for such "cleansed title" sales in order to give  
23 comfort to buyers from the estate that they will receive what they pay  
24 for and allow the recovery to the estate to be maximized. The sale of  
25 AIR, LLC's assets in the main case was approved under §§ 363(b) and (f),  
26 and the sale was beneficial to the estate.

1           However, what could not be sold in such a sale were assets,  
2 comingled with the AIR, LLC assets, that AIR, LLC did not own. See Popp  
3 v. Zimmerman (In re Popp), 323 B.R. 260, 266 (9th Cir. BAP 2005).

4           Because of cost considerations, the sale of AIR, LLC assets preceded the  
5 inventory process required to separate out the assets at the facility  
6 that were owned by the amateur builders. However, the process developed  
7 through the Stipulated Inventory Order ultimately was essential to  
8 provide for that separation.

9           The terms of the relevant orders and the evidence submitted by  
10 the parties through declarations and authenticated exhibits establish  
11 that there is no genuine issue of material fact that the authorized  
12 representative of BSA and Brink was given complete access to the facility  
13 to claim and identify any personal property items that BSA and Brink  
14 claimed they owned, consistent with the terms of the Stipulated Inventory  
15 Order. I understand that both BSA and Brink paid a lot of money for  
16 their aircraft, and they both have very substantial claims in the AIR,  
17 LLC case on which they will receive distributions, based on present  
18 estimates, that will be substantially less than twenty cents on the  
19 dollar. They have submitted evidence that their aircraft were the next  
20 two in line to be completed when AIR, LLC's operations at the facility  
21 were shut down. They also have presented evidence that their partially  
22 completed aircraft may have been cannibalized by representatives of AIR,  
23 LLC, with parts having been transferred to other amateur builders'  
24 aircraft. Accordingly, part of their argument in opposition to the  
25 Complaint initially and to the Motion is the inventory process, as  
26 conducted under the Stipulated Inventory Order, did not give them an

1 appropriate opportunity to identify not only the personal property they  
2 owned, but personal property inventory and equipment items to which they  
3 were entitled because they needed such items to complete their aircraft.  
4 Outside of bankruptcy, their claims may be compelling, and they may have  
5 independent avenues to pursue them. However, that argument is simply  
6 incompatible with the sale and inventory processes that were authorized  
7 in the AIR, LLC case. All assets that AIR, LLC owned were sold free and  
8 clear of the defendants' claims. BSA and Brink were given a clear and  
9 adequate opportunity to claim what they owned at the facility, and the  
10 assets they claimed ownership in have been turned over to them. My  
11 specific dispositions as to each of the claims at issue in the Motion is  
12 as follows:

13  
14 2. Summary judgment on Count 1

15 BSA and Brink advance several arguments as to why LTB is not  
16 entitled to summary judgment on Count 1. Their arguments essentially  
17 boil down to a challenge to the Stipulated Inventory Order's terms and  
18 the facility inventory process as applied when Emerson visited the  
19 facility to identify and assert claims to BSA and Brink's personal  
20 property.

21  
22 a. Stipulated Inventory Order governed facility inventory  
23 process

24 BSA and Brink first contend that the Stipulated Inventory Order  
25 did not control the facility inventory process because Thornton-Smith  
26 developed her own procedures without reference to the Stipulated

1 Inventory Order. They rely on Thornton-Smith's statement at her  
2 March 24, 2011 deposition that she never received a copy of the  
3 Stipulated Inventory Order. Declaration of Lisa Schiller in Support of  
4 Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment  
5 ("Schiller Declaration")(adv. proc. docket no. 88), Exhibit 2 at 8,  
6 Deposition of Christa A. Thornton-Smith ("Thornton-Smith Deposition"),  
7 34:18-22. Accordingly, BSA and Brink argue, the facility inventory  
8 procedures set forth in the Stipulated Inventory Order are irrelevant.

9 Paragraphs 4(b) and 4(d) of the Stipulated Inventory Order  
10 required the trustee and/or LTB to grant amateur builders access to the  
11 facility "at prearranged times" to identify and tag personal property  
12 items in which they claimed an ownership interest. The trustee and LTB  
13 were given discretion to fashion and implement additional procedures to  
14 facilitate this process under paragraph 2 of the Stipulated Inventory  
15 Order.

16 Although she did not receive a copy of the Stipulated Inventory  
17 Order, Thornton-Smith discussed her proposed procedures with both the  
18 trustee and Douglas King, managing member of LTB. Thornton-Smith  
19 Deposition, 35:2-3, 37:18-19, 38:4-5; Declaration of Christa A. Thornton-  
20 Smith at 5 ("Thornton-Smith Declaration")(adv. proc. docket no. 45);  
21 Supplemental Declaration of Christa A. Thornton-Smith at 2 ("Supplemental  
22 Thornton-Smith Declaration")(adv. proc. docket no. 101). Both the  
23 trustee and King confirmed this, further asserting that they approved her  
24 proposed procedures for the facility inventory. Declaration of Kenneth  
25 S. Eiler at 2-3 ("Eiler Declaration")(adv. proc. docket no. 100);  
26 Declaration of Douglas King at 3 ("King Declaration")(adv. proc. docket

1 no. 44); Supplemental Declaration of Douglas King at 2 ("Supplemental  
2 King Declaration")(adv. proc. docket no. 102).

3 Thornton-Smith recommended to the trustee and King a multi-step  
4 process for the facility inventory. Supplemental Thornton-Smith  
5 Declaration at 2. She first would go through the facility to organize  
6 the personal property items therein in bulk or piles (for safety  
7 purposes), then tag bulk and specific personal property items. Thornton-  
8 Smith Deposition, 35:24-25, 36:1-5, 37:20-25, 38-1; Supplemental  
9 Thornton-Smith Declaration at 2. As Thornton-Smith organized the  
10 facility, she pulled out personal property items she believed belonged to  
11 each amateur builder and grouped those items next to that amateur  
12 builder's aircraft. Supplemental Thornton-Smith Declaration at 2;  
13 Thornton-Smith Deposition, 37:22-25, 41:5-6, 42:8-11.

14 Thornton-Smith next scheduled an appointment with each amateur  
15 builder or its proxy. Supplemental Thornton-Smith Declaration at 2. At  
16 the start of the appointment, Thornton-Smith provided the amateur builder  
17 or its proxy a list of airplane parts within the facility (i.e.,  
18 "inventory spreadsheet") to help amateur builders identify their personal  
19 property items. Id. at 3. Thornton-Smith then accompanied amateur  
20 builders during their appointments, giving them unrestricted access to  
21 the facility. Id. She noted all personal property items claimed by the  
22 amateur builder listed on the inventory spreadsheet and had the amateur  
23 builder add personal property items not listed on the inventory  
24 spreadsheet. Id.

25 Regardless of whether or not Thornton-Smith received a copy of  
26 the Stipulated Inventory Order, the evidence before me indicates that the



1 Stipulated Inventory Order informed and guided the facility inventory  
2 process. Thornton-Smith explained in her declarations and at her  
3 deposition her proposed facility inventory procedures, which are  
4 consistent with those set forth in the Stipulated Inventory Order. The  
5 trustee and LTB moreover exercised their discretion, as provided under  
6 paragraph 2 of the Stipulated Inventory Order, by allowing Thornton-Smith  
7 to propose further procedures for the facility inventory and by approving  
8 them. BSA and Brink have not provided any evidence showing how Thornton-  
9 Smith's non-receipt of the Stipulated Inventory Order rendered her  
10 proposed facility inventory procedures inappropriate or inconsistent with  
11 the terms of the Stipulated Inventory Order. BSA's and Brink's argument  
12 thus lacks merit.

13  
14 b. No "master" facility inventory required

15 BSA and Brink next maintain that the facility inventory process  
16 involved a two-step process, the second step of which required the  
17 trustee and/or LTB to prepare a "master" facility inventory. This master  
18 facility inventory, BSA and Brink claim, was to include all personal  
19 property items within the facility, not merely those personal property  
20 items in which each amateur builder claimed an ownership interest.

21 A plain reading of the relevant provisions in the China  
22 Aviation APA and Paragraph 4(d) of the Stipulated Inventory Order  
23 invalidates this argument. Section 10.3(b) of the China Aviation APA  
24 states that "[u]pon completion and delivery of the inventory of assets to  
25 [China Aviation, the third-party] will provide a copy of the inventory of  
26 assets to . . . each of the [amateur builders]." Paragraph 4(d) of the

1 Stipulated Inventory Order provides that the trustee and/or LTB "shall  
2 catalog, by description and location within the Facility, all items of  
3 personal property located in the Facility as to which any of the Notice  
4 Parties assert ownership interests, and shall identify . . . each such  
5 item of personal property and the party or parties claiming ownership of  
6 such item."

7         Nothing in either section 10.3(a) of the China Aviation APA or  
8 paragraph 4(d) of the Stipulated Inventory Order indicates that the  
9 trustee and/or LTB had to list in the facility inventory each and every  
10 single item of personal property in the facility. The trustee's  
11 Inventory Status Report and Supplemental Status Report carried out the  
12 objective of paragraph 4(d). Both the Inventory Status Report and the  
13 Supplemental Status Report describe the disputes between the various  
14 claimants and include as exhibits lists of the disputed personal property  
15 items.

16         Moreover, as set forth in paragraph 2 of the Stipulated  
17 Inventory Order, the trustee and LTB were authorized to establish  
18 additional procedures, in their discretion, to accomplish the facility  
19 inventory.<sup>7</sup> As the declarations submitted by LTB show, the trustee and  
20 LTB, in their discretion, decided to list only those personal property  
21 items in which amateur builders had claimed an ownership interest.

22         The trustee acknowledged in his declaration that the facility  
23 inventory procedures included providing lists of parts to amateur  
24

---

25         <sup>7</sup> Paragraph 4(b) of the Stipulated Inventory Order indicates that  
26 the amateur builders would be subject to further procedures when they  
visited the facility to identify and claim the personal property they  
owned therein.

1 builders. Eiler Declaration at 3. He determined, however, that such  
2 lists were not material to the claiming process. Id.

3 King explained in his declaration that he believed that  
4 "creating a running list of every single nut and bolt within the Facility  
5 would have been onerous, impractical, and pointless." King Declaration  
6 at 3. He opined that it "would have been physically impossible to  
7 complete a detailed packing list-type inventory of every single item of  
8 personal property within the Facility before BSA and Brink and other  
9 . . . builders entered to begin the identification process." Id. Such a  
10 requirement, King maintained, "would have been impossible to meet within  
11 the time constraints of the [Stipulated Inventory] Order and was  
12 unnecessary to allow persons to claim personal property." Supplemental  
13 King Declaration at 2.

14 BSA and Brink offer the declaration of Richard Lucibella, BSA's  
15 principal and managing member, in support of their interpretation of the  
16 Stipulated Inventory Order. Lucibella asserted that he always understood  
17 and maintained that a comprehensive facility inventory first needed to be  
18 completed in order to separate personal property belonging to LTB and the  
19 amateur builders. Declaration of Richard Lucibella in Support of  
20 Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment  
21 at 5 ("Lucibella Declaration")(adv. proc. docket no. 85). Such  
22 interpretation is contrary to the terms of the Stipulated Inventory  
23 Order, that BSA's counsel signed. However, Lucibella construed the  
24 Stipulated Inventory Order to provide for the following steps: (1) the  
25 amateur builders first would identify and tag their personal property  
26 items within the facility; (2) the trustee and LTB next would prepare a

1 full, comprehensive facility inventory; and (3) the amateur builders  
2 finally would review the facility inventory and determine whether  
3 competing ownership claims had been made against their personal property  
4 items, which they would try to resolve. Lucibella Declaration at 5.

5 Lucibella attached to his declaration copies of various e-mails  
6 between him or his counsel, counsel for the trustee and counsel for LTB  
7 as evidence in support of his understanding. See Exhibits 1-4, 8-9  
8 attached to Lucibella Declaration. None of the e-mails supports  
9 Lucibella's interpretation of the Stipulated Inventory Order. For  
10 example, the e-mail from counsel for the trustee merely states: "Don't  
11 have [the facility inventory] yet, but will forward as soon as I do."  
12 The trustee further informed Lucibella that he and his counsel "will have  
13 the order then, but if not, we will be able to address [BSA's] issues and  
14 make sure that the stipulated order reflects them."

15 Lucibella once or twice expressed in his e-mails his need for a  
16 comprehensive facility inventory to help him identify his personal  
17 property items and any competing claims thereto. But in most, if not all  
18 of his e-mails, he mainly expressed his wishes to have a third-party  
19 conduct the facility inventory. Based on the e-mail exchanges between  
20 Lucibella, the trustee and LTB, it appears that the trustee and LTB  
21 addressed his main concern.

22 Nothing in the evidence in the record before me indicates that  
23 the Stipulated Inventory Order contemplated a two-step process for the  
24 facility inventory. BSA and Brink have not provided sufficient evidence  
25 in support of their interpretation of the Stipulated Inventory Order to  
26 raise a genuine issue of material fact.

1 c. Emerson fully participated in facility inventory process

2 BSA and Brink claim that they were not afforded an opportunity  
3 to participate fully in the facility inventory process in the following  
4 ways: (1) Thornton-Smith did not give Emerson a full facility inventory  
5 (i.e., inventory spreadsheet); (2) Thornton-Smith instructed Emerson only  
6 to identify and/or tag personal property items that belonged to either  
7 BSA or Brink; and (3) BSA and Brink had only one opportunity to visit the  
8 facility, whereas other amateur builders affiliated with LTB had multiple  
9 visits.

10 In his declaration, Emerson claimed that Thornton-Smith did not  
11 provide him with a complete inventory spreadsheet. Declaration of Ashely  
12 Emerson in Support of Defendants' Opposition to Plaintiff's Motion for  
13 Partial Summary Judgment at 3 ("Emerson Declaration").

14 Thornton-Smith explained that she only created a comprehensive  
15 inventory spreadsheet after the identification process was completed.  
16 Supplemental Thornton-Smith Declaration at 4. Even then, she stated, the  
17 inventory spreadsheet did not itemize every personal property item in the  
18 facility. Id. She further explained that the differences in the  
19 inventory spreadsheets provided to other amateur builders arose as claims  
20 to specific personal property items were added and the inventory  
21 spreadsheets became more extensive. Id. at 5. The first inventory  
22 spreadsheet Thornton-Smith provided to Emerson contained mainly bulk  
23 items. Id. at 4. As each amateur builder visited the facility and  
24 claimed specific personal property items, Thornton-Smith added a more  
25 specific description of each personal property item. Id. at 4; Thornton-  
26 Smith Declaration at 5. As a result, the inventory spreadsheets became

lengthier. Thornton-Smith Declaration at 5. Amateur builders who visited the facility later in the facility inventory process received more detailed versions of the inventory spreadsheets. Thornton-Smith Declaration at 5. Thornton-Smith further admitted that she may have made mistakes in printing out the inventory spreadsheets because of her limited computer skills. Supplemental Thornton-Smith Declaration at 5.

Emerson also asserted that he did not identify and/or tag general inventory items because both Thornton-Smith and King advised him only to identify and/or tag personal property items belonging to BSA and Brink. Emerson Declaration at 3-4. There is nothing inconsistent in those statements with the inventory process provided for in the Stipulated Inventory Order. He claimed that Thornton-Smith never advised him that he should have been identifying and/or tagging personal property items necessary to complete the aircraft of BSA and Brink.<sup>8</sup> Emerson Declaration at 4. She would not have been doing her job if she had.

Thornton-Smith explained that she told Emerson "to tag anything

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<sup>8</sup> Thornton-Smith noted that Emerson tagged other personal property items in addition to those listed in the inventory spreadsheet as already identified as belonging to BSA and Brink. Supplemental Thornton-Smith Declaration at 6. According to King, Emerson tagged "general inventory [items], such as intake covers, instrument panel harnesses, and cables." King Declaration at 4.

Emerson explained that he did not tag any general inventory items. Emerson Declaration at 6. He added to the inventory spreadsheet personal property items previously assigned and owned by BSA; the intake covers were painted with BSA's custom paint, the wiring harness was embossed with BSA's serial number, and the cables already were in BSA's aircraft. Id.

Regardless of whether Emerson did or did not tag general inventory items, Emerson had the opportunity to identify and tag general inventory items during his visit, as provided for under paragraph 4(b) of the Stipulated Inventory Order.

1 that he felt belonged to either [BSA] or Brink." Thornton-Smith  
2 Deposition, 65:15-16. She specifically told him that he could "identify  
3 any property in the facility in which BSA or Brink claimed an interest,  
4 without limitation." Thornton-Smith Declaration at 4. Thornton-Smith  
5 also stated that Emerson was "allowed anywhere in the facility."  
6 Thornton-Smith Deposition, 65:22; Thornton-Smith Declaration at 4. King  
7 asserted that he never "instructed [Emerson] that he should not claim  
8 anything he wanted to claim." Supplemental King Declaration at 3. King  
9 averred that he "said nothing to Emerson regarding any instructions  
10 regarding his appointment and in any event [King] would not have said  
11 anything or done anything to interfere with CAZ and Emerson in any way."  
12 Id.

13 Paragraph 4(b) of the Stipulated Inventory Order provided that  
14 amateur builders were to be granted entry into the facility to identify  
15 "any property in which they claim an ownership interest." As shown in  
16 her declarations and at her deposition, Thornton-Smith provided  
17 instructions consistent with the objectives of the Stipulated Inventory  
18 Order. Neither Thornton-Smith nor King nor the Stipulated Inventory  
19 Order limited or narrowed the types of personal property items in which  
20 Emerson could claim an ownership interest on BSA's and Brink's behalf.

21 BSA and Brink further claimed that Thornton-Smith and/or CAZ  
22 afforded other amateur builders more than one visit to the facility.  
23 According to the evidence, however, aside from King and Daryle Ingalsbe  
24 (another principal of LTB), no other amateur builder made multiple visits  
25 to the facility.

26 Thornton-Smith explained that King and Ingalsbe made claims on

1 multiple occasions because they were continually present at the facility  
2 conducting business for LTB. Supplemental Thornton-Smith Declaration at  
3 4. King explained that the trustee authorized him and Ingalsbe, as  
4 buyers of the debtor's assets, to be present in the facility while CAZ  
5 and Thornton-Smith conducted the facility inventory. Supplemental King  
6 Declaration at 3. King and Ingalsbe were at the facility to conduct  
7 LTB's business. Id.

8 Based on the evidence in the record before me, I conclude that  
9 Emerson had the opportunity to participate fully in the facility  
10 inventory process to claim personal property owned by BSA and Brink. The  
11 defendants have not provided any evidence to create a genuine issue of  
12 material fact tending to establish otherwise.

13  
14 d. Waiver under Stipulated Inventory Order

15 LTB contends that BSA and Brink waived their right to claim  
16 additional personal property items within the facility after their  
17 April 30, 2010 appointment. LTB argues that the Stipulated Inventory  
18 Order clearly provided that any failure by an amateur builder to claim  
19 personal property items during its appointment waived its right to claim  
20 such items later.

21 Plainly reading paragraph 4(b) and paragraph 6 of the  
22 Stipulated Inventory Order, I agree with LTB that BSA and Brink cannot  
23 assert any further claims to additional personal property items at the  
24 facility after their appointment. Paragraph 4(b) clearly states that  
25 unless alternative arrangements have been made, an amateur builder waives  
26 its right to claim specific personal property items in the facility if it



1 fails to assert its claim by the deadline date. Paragraph 6 further  
2 bolsters the waiver in providing that the facility inventory is "the  
3 exclusive and final method of establishing the ownership of personal  
4 property [items] in the facility." Moreover, paragraph 2 of the  
5 Stipulated Inventory Order required that the facility inventory be  
6 completed by June 7, 2010, in light of the sale of the debtor's assets to  
7 China Aviation and LTB, as assignee. Altogether, these provisions  
8 imposed a strict deadline by which amateur builders had to claim their  
9 ownership interests in specific personal property items.

10 As LTB points out, BSA and Brink had their chance on April 30,  
11 2010, to claim an ownership interest in any personal property items at  
12 the facility. Through their proxy, Emerson, BSA and Brink did so.  
13 Emerson had unrestricted access to the facility. He identified and  
14 tagged various personal property items. Emerson could have identified  
15 and tagged any personal property item as belonging to BSA and Brink  
16 during the appointment. Once he completed his appointment, he waived any  
17 further chance to identify and tag any additional personal property items  
18 as belonging to BSA and Brink.

19 BSA and Brink have not come forth with sufficient evidence to  
20 raise a genuine issue of material fact that they had a right to claim  
21 additional personal property items after they completed their April 30,  
22 2010 appointment. Accordingly, I conclude that LTB is entitled to  
23 summary judgment on Count 1.

### 24 25 3. Summary judgment on Count 2

26 LTB seeks summary judgment on its claim that it owns all of the

1 personal property items in which BSA and Brink now assert an ownership  
2 claim in their Additional Items Lists, as LTB had purchased all of the  
3 debtor's assets (with certain exceptions) under the sale. Neither BSA  
4 nor Brink, LTB argues, has provided any evidence supporting their alleged  
5 ownership claims.

6 BSA and Brink submitted the Additional Items Lists to the  
7 trustee, who incorporated these lists as Exhibit A and Exhibit B,  
8 respectively, in the Supplemental Status Report and Inventory  
9 Confirmation Order. The trustee noted that the personal property items  
10 on the Additional Items Lists were subject to competing claims of LTB  
11 and/or other amateur builders. Supplemental Status Report at 2.

12 Count 2 is generally but not entirely congruent with Count 1.  
13 While it is true that LTB purchased all of AIR, LLC's assets under  
14 Section 1.1 of the China Aviation APA, I cannot determine which of the  
15 personal property items in the Additional Items Lists constitute assets  
16 purchased by China Aviation and LTB, and what items may have left the  
17 facility with aircraft of other builders. Section 1.1(a) and Section  
18 1.1(b) of the China Aviation APA provide that the purchased assets  
19 include all equipment, molds, hand tools, all supply inventories, raw  
20 materials, parts and finished goods inventory owned by AIR, LLC. The  
21 brief descriptions of these personal property items are not sufficiently  
22 specific for me to determine which personal property items constitute  
23 these assets.

24 Moreover, as BSA and Brink point out, the dispute over the  
25 personal property items listed in the Additional Items Lists may involve  
26 other individual amateur builders, not LTB. I cannot determine from the

1 evidence in the record before me whether the personal property items in  
2 the Additional Items Lists actually belong to LTB. Accordingly, I will  
3 grant summary judgment in favor of LTB on Count 2 with respect to all  
4 personal property items retained by LTB at the facility. However, LTB  
5 has no standing as the "real party in interest" to a declaratory judgment  
6 that it owns items of personal property on the Additional Items List that  
7 have left the facility with the aircraft of other amateur builders. See  
8 Warth v. Seldin, 422 U.S. 490, 499 (1975):

9           The plaintiff generally must assert his own legal  
10          rights and interests, and cannot rest his claim to  
11          relief on the legal rights or interests of third  
12          parties.

13 Since such other amateur builders are not parties in this Adversary  
14 Proceeding, and my jurisdiction is at best questionable with respect to  
15 any claims that BSA and Brink may have against such other amateur  
16 builders, to the extent I do not grant summary judgment to LTB on Count  
17 2, I will dismiss it for failure to state a claim upon which relief can  
18 be granted.

19 4. Summary judgment on Counterclaim 1

20           LTB moves for summary judgment on Counterclaim 1 for failure to  
21 state a claim upon which relief can be granted. LTB's Motion is  
22 procedurally compatible with Civil Rules 12(c) and 12(h)(2), applicable  
23 under Rule 7012(b). In Counterclaim 1, defendants seek a judgment  
24 "declaring the Trustee's Supplemental Report Re Inventory (August 14,  
25 2010) (Docket No. 507) as the operative Inventory Report." I conclude  
26 that LTB's Motion is well taken because I have no idea what the

1 defendants' request for relief in Counterclaim 1 means.

2 Factual allegations in a complaint or counterclaim "must be  
3 enough to raise a right to relief above the speculative level," Bell Atl.  
4 Corp. v. Twombly, 550 U.S. 544, 555 (2007), and must be adequate to  
5 "state a claim to relief that is plausible on its face." Ashcroft v.  
6 Iqbal, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009). I have no idea what  
7 relief the defendants are requesting in terms of the potential operative  
8 effect of the claim stated in Counterclaim 1, and I believe that under  
9 the standards announced by the Supreme Court in Twombly and Iqbal, both  
10 the bankruptcy court and LTB are entitled to know what effect defendants  
11 have in mind for Counterclaim 1 if it is to proceed beyond the summary  
12 judgment stage. No such illumination has been provided by defendants in  
13 response to the Motion. Summary judgment is appropriate in favor of LTB  
14 on Counterclaim 1.

15  
16 5. Summary judgment on Counterclaim 3

17 As to the Counterclaim 3, I agree with LTB that it is moot, as  
18 BSA and Brink were afforded a reasonable opportunity and already have  
19 identified personal property items at the facility in which they claim an  
20 ownership interest. BSA and Brink identified further claimed personal  
21 property items by compiling the Additional Items Lists. Because no  
22 genuine issue of material fact has been raised as to Counterclaim 3, I  
23 grant summary judgment in favor of LTB.

24  
25 6. Summary judgment on Counterclaim 4

26 With respect to the Counterclaim 4, I again agree with LTB that

1 it is moot, as BSA, Brink and LTB already have attempted to resolve their  
2 disputes over the ownership of certain personal property items through a  
3 court-sponsored mediation process with Judge Brown. Accordingly, I grant  
4 summary judgment in favor of LTB, as no genuine issue of material fact  
5 exists as to Counterclaim 4.

6  
7 Conclusion

8 Based on the record before me and my application of applicable  
9 legal authorities, I will grant the Motion as to Count 1, and  
10 Counterclaims 1, 3 and 4 in its entirety; I will grant summary judgment  
11 in part as to Count 2 and dismiss the balance for failure to state a  
12 claim upon which relief can be granted; and I will dismiss Counterclaim 2  
13 as moot, as agreed by the parties. Counsel for LTB should submit an  
14 order consistent with the conclusions in this Memorandum Opinion within  
15 the next ten days.

16 ###

17  
18 cc: Susan S. Ford  
19 Timothy A. Solomon  
20 Marjorie A. Elken  
21 Lisa M. Schiller  
22 Norman Malinski  
23  
24  
25  
26